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ABSTRACT

Influences on the California Supreme Court's educational policy decisions were studied for the 26 California Supreme Court Justices who served during 1954-1982. It was found that the intensity of political party affiliation was significantly related to support for college students' and professors' claims of civil rights and liberties in non-unanimous education cases. The justices' voting behavior was not significantly affected by the election of a governor of a political party other than that of the preceding governor. Attitudes and voting behavior of the justices heavily depended on the justice's political party, the appointing governor's political party, and the governor's religion. A justice's religion was, by itself, not sufficient to significantly affect voting behavior, nor were age at appointment, or number of years on the court. A court's propensity to support the education agency in educational decisions was not affected by the party affiliation of the court majority. The Supreme Court during 1954-1970 and that during 1970-1982 did not differ significantly in its propensity to vote on state constitutional grounds. It is concluded that the California high court, supported by the attitudes and values of the justices, engages in social change and reform. (SW)

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EDUCATION DECISION-MAKING: THE INFLUENCE OF THE POLITICAL AND SOCIAL ENVIRONMENT ON THE JUSTICES OF THE CALIFORNIA SUPREME COURT, 1954-1982

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EDUCATION DECISION-MAKING:
THE INFLUENCE OF THE POLITICAL AND SOCIAL ENVIRONMENT
ON THE JUSTICES OF THE CALIFORNIA SUPREME COURT, 1954-1982*

Introduction

In the modern history of California Supreme Court education decisions that address the rights of students, professors, and their employing institutions, it becomes apparent that an understanding of "the law" does not suffice to explain, or to predict, judicial behavior.

Instead, one must take into account a number of variables in order better to comprehend judicial behavior. These include, for example, a justice's political party, the intensity of that political party affiliation, the party of the appointing governor, and the religion of both the justice and the appointing governor. These factors help explain how court decisions shape the educational present and future for Californians.

*Note: This article summarizes a 258 page study by the author.

The current California Supreme Court on occasion has chosen to circumvent federal constitutional law by adhering to the concept of federalism, that is, states rights, and by basing its decisions on the State Constitution. Other state high courts have followed California's lead.(1) As a result, the state court has reached decisions contrary to those of the United States Supreme Court in cases involving parallel issues in such crucial areas of education policy as individual rights and the more equitable allocation of resources. Justice Stanley Mosk of the California Supreme Court stated that when individual rights cannot be obtained through the federal system, states may guarantee those rights by interpreting their own state constitution, thus avoiding federal review (Mosk 1978, p.718). The area is fraught with sharp ideological differences between the two courts--California's liberal views and the United States Supreme Court's decidedly more conservative bent--as they are presently constituted. The significance of this state court's and other state courts' decisions for the educational policymaker is clear, for educators cannot assume that the United States Supreme Court, though "the highest court in the land," will be the final word on an array of education-related matters.

(1) Some of them are Arkansas, Colorado, Connecticut, Maryland, New Jersey, Washington, Wyoming, and West Virginia.

Policy implications

The California Court has maintained its independence, especially since 1970 when the United States Supreme Court began to be perceived as a more conservative court, by using the tools of federalism and states rights to extend and, indeed, to expand constitutional rights protection within the field of education. Some commentators have suggested that such policy-making by judicial decision, in addition to creating possible problems for the division of powers (Kirp 1981, p.412), can circumvent community wishes and local public officials (Finn 1981), and may contribute to increased distrust of government and the judiciary (Hager 1980; Pressman 1980).

The forces which prompt judicial policy-making are several: the need for a means to redress grievances, to shape changes in public attitude toward individual and First Amendment rights, and the raising of our national social conscience. Thus the schools can serve as an institution through which a reluctant public may be urged to confront and accept social change.

The policy impact on educators and the bureaucracies burdened with enforcement, however, is often a formula for indifferent failure. This is so for three reasons: First, court-made decisions have neither the power of, nor the concern with,

budget, authorization, or appropriations (Kirp 1981, p.407). Second, courts do not have the legitimation of the affected constituency (Dolbeare and Hammond 1978, pp.575-7; Finn 1981). Third, courts do not have enough objective social science data guiding the feasibility of the practical, programmatic aspects of their policies (Levin 1977; Kirp 1977; Doyle 1977; Rist 1978; Moynihan 1979).

Research questions

There has not been an analysis of the California Supreme Court and its long-term effects on education policy-making. The central questions of this study are: First, what has been the voting behavior in education decisions of the individual judges of the California Supreme Court and of the Court as a series of small groups from 1954 through 1982? Second, can we explain this behavior by looking at some background and environmental variables of the judiciary? For example, if a judge is a Democrat, can we predict that he will be more likely to vote in certain ways than will his Republican counterpart? Will a majority Republican court decide education issues in a predictable pattern?

In recent years, the California high court frequently has

intervened as a protector of minority rights and individual constitutional rights. What has been the role, if any, of the court as an agent of social change? More speculatively, have the schools been designated by the courts as major implementors of social change (Dror 1971, p.41), perhaps well beyond any such views of the United States Supreme Court?

Specifically, then, given the California Supreme Court's distinctive position, this study seeks to determine to what extent the court's education policy decisions have been influenced by the judges' background and environmental variables, and which variables, if any, are related to voting behavior in education policy issues. At stake are such issues as the extent to which a governor's nominations to the California Supreme Court can shape basic education policy and the extent to which a governor might be able to predict the consequences for education policy of his nominations to the state's highest court.

Method of analysis

Subjects

This study includes all California Supreme Court Justices who served from 1954 through 1982. Decisions in which a justice participated prior to or following this span of time fell outside the scope of this research and were not analyzed.

Sample size

There were twenty-six justices within the time frame. Obviously this was not only a sample, but also the entire population of California Supreme Court judges, and the usefulness of statistical inference may be limited. Other studies have tolerated this flaw, merely commenting in passing. Relationships may be presumed to be descriptive rather than generalized to other judiciaries. If, however, one assumes that the California court is a sample of a larger court universe, then statistical inference may be valid (Goldman 1975, p.496).

How the hypotheses were tested

For purposes of this research the following hypotheses were formulated: 1. Hypothesis One proposed that a significant relationship would exist between intensity of political party affiliation and support for students' and professors' claims of civil rights and liberties in non-unanimous education cases decided by the California Supreme Court. Intensity of justice's political party affiliation was divided into four independent groups. One-way analysis of variance was employed to test the significance of the differences among the means of the four groups.

2. Hypothesis Two suggested that California Supreme Court justices' voting behavior would not be significantly affected by the election of a governor of a political party other than that of the preceding governor. This was tested by comparing groups of identical judges in an equal number of years before and after political power changes. Since there were three power changes, three t-tests for paired differences were used to compute the difference between the means of the groups before and after the power changes.

3. Hypothesis Three said that judicial voting behavior would be significantly related to key background variables. The

hypothesis was first tested by determining which, if any, of the background variables could best predict the dependent variable: a judge's score on the number of votes in support of the civil rights/liberties issues in non-unanimous education decisions. How much of the variance which could be explained was tested with a stepwise multiple regression analysis. The regression failed, however, because of technical problems.

The second analysis used four t-tests for independent groups to test the equality of the mean scores in favor of civil rights of those justices who were

a. Democrats and those who were Republicans,

b. non-Protestants and those who were Protestants,

c. appointed by Democratic governors and those appointed by Republican governors,

d. appointed by non-Protestant governors and those appointed by Protestant governors.

4. Hypothesis Four proposed that the propensity of the court to support the education agency in all education decisions, both unanimous and non-unanimous, would not be related to the party affiliation of the court majority. This was tested by categorizing each bi-party court from 1954 to 1982 as majority Republican and majority Democratic. The rate of support for the

education agency in all education decisions was the dependent variable here. 1.0 was deciding for, 0.0 was non-support of the agency, that is, no part of the decision supported the agency. The aggregate courts were compared by the use of chi-square.

5. Hypothesis Five suggested that a significant difference would exist between the recent-era (1970-82 terms) courts and previous courts (1954-70) in their propensity to oppose federal standards and rule on independent state grounds in education decisions. This final hypothesis was tested by using the aggregate courts, all majority Democratic as it turned out, from the years 1954 through May, 1970. The remaining terms constituted a separate court, called, for the purposes of this hypothesis, the recent-era court. The number of decisions which ruled on state constitutional grounds, or had the effect of opposing the United States Supreme Court, in all education decisions was the dependent variable. A vote based only on state constitutional grounds or which opposed federal construction yielded a score of 1.0. The earlier period court was compared with the recent-era court using a Phi Contingency Coefficient to determine if there were any significant difference in the voting behavior of the two courts.

Results

Intensity of party affiliation and voting behavior

When the justices were grouped by intensity of party affiliation, a significant difference was found among the mean scores of the justices' votes, thus supporting Hypothesis One. Each of the 26 justices was assigned, by virtue of the presence or absence of partisan political activity, to one of four groups: active or nominal Democrat and active or nominal Republican. Using an analysis of variance, with one exception--the difference between the mean scores of active and nominal Democrats--all combinations of groups had significant differences between the means. Although nominal Democrats tended to vote like active Democrats, nominal Republicans also tended to vote more liberally, that is, more often than not in favor of civil rights expansion for students, professors, and others.

On the other hand, no active Republican favored the claimants of civil rights very often, and no active Democrat did not favor the claimants. To put it another way, active Republicans all had low mean scores and active Democrats all had high mean scores for civil rights decisions (see Table 4-2).

TABLE 4-2

Party Intensity and Voting Behavior

The mean score* of each judge in each group

	Group 1 Active Democrats	Group 2 Nominal Democrats	Group 3 Nominal Republicans	Group 4 Active Republicans
1.00-.90:	1.00	1.00		
	1.00	1.00		
	.93	.94		
.89-.80:	.87	.85		
	.81			
.79-.70:	.73	.74		
		.72		
.69-.60:		.64	.69	
			.62	
.59-.50:		.50	.57	
			.50	
.49-.40:		.43		
.39-.30				
.29-.20			.29	.29
.19-.10			.10	.13
.09-.00				.00

*mean score is how often the California Supreme Court Justice voted in favor of claims of civil rights by students, professors, teachers, their unions, etc. in non-unanimous education decisions.

One could conclude from these findings that a background of partisan political activity mitigates against a justice's being a moderate. On both extremes of the political spectrum, active Republicans and active Democrats always voted a strict party line.

Some nominal Democrats and all nominal Republicans, by way of contrast, did not always decide in accordance with their party affiliation. One could interpret this in two ways: First, it could be said that moderates, in this case nominal Democrats and Republicans, allow themselves to swing in either direction, depending on the legal issues. Others might construe this as being uncommitted, or not having firm values.

But there is room on the court for diversity. The judicial activists fulfill the expectations required to guarantee due process and equal protection. The nominals, those who are possibly more pragmatic, may also be more willing to compromise and negotiate, giving in on one decision in order to win another. The conservatives assert themselves in another way. Their adherence to stare decisis and devotion to local control play an important role in the personality, if you will, of the California Supreme Court. Seven judges who agree, who always present a moderate, united front, may be less subject to controversy. But they may also constitute a lesser court.

The influence of change in political power

Hypothesis Two proposed that California Supreme Court justices' voting behavior would not be significantly affected by the election of a governor of a political party other than that of the preceding governor.

Studies of federal courts have shown that justices are influenced by the pressures of local political and social cues. The voting behavior of individual justices of the California Supreme Court, however, was apparently not modified by political power patterns or majoritarian will exerted by the election of a governor of a political party other than that of the governor who appointed each justice.

The mean scores of the same judges before and after change in governor's party were compared. The intent was to find out if the justices changed the way they voted when a shift in power occurred.

In California, from 1954-82, there were three shifts in power as a result of the elections of 1958, 1966, and 1974. A Republican governor was in office from 1954-58, a Democrat from 1959-66, a Republican again from 1967-74, and another Democrat from 1975-82. California Supreme Court justices whose terms spanned the years

both before and after these administrations and who also took part in a number of non-unanimous education decisions constituted the groups whose mean scores were compared.

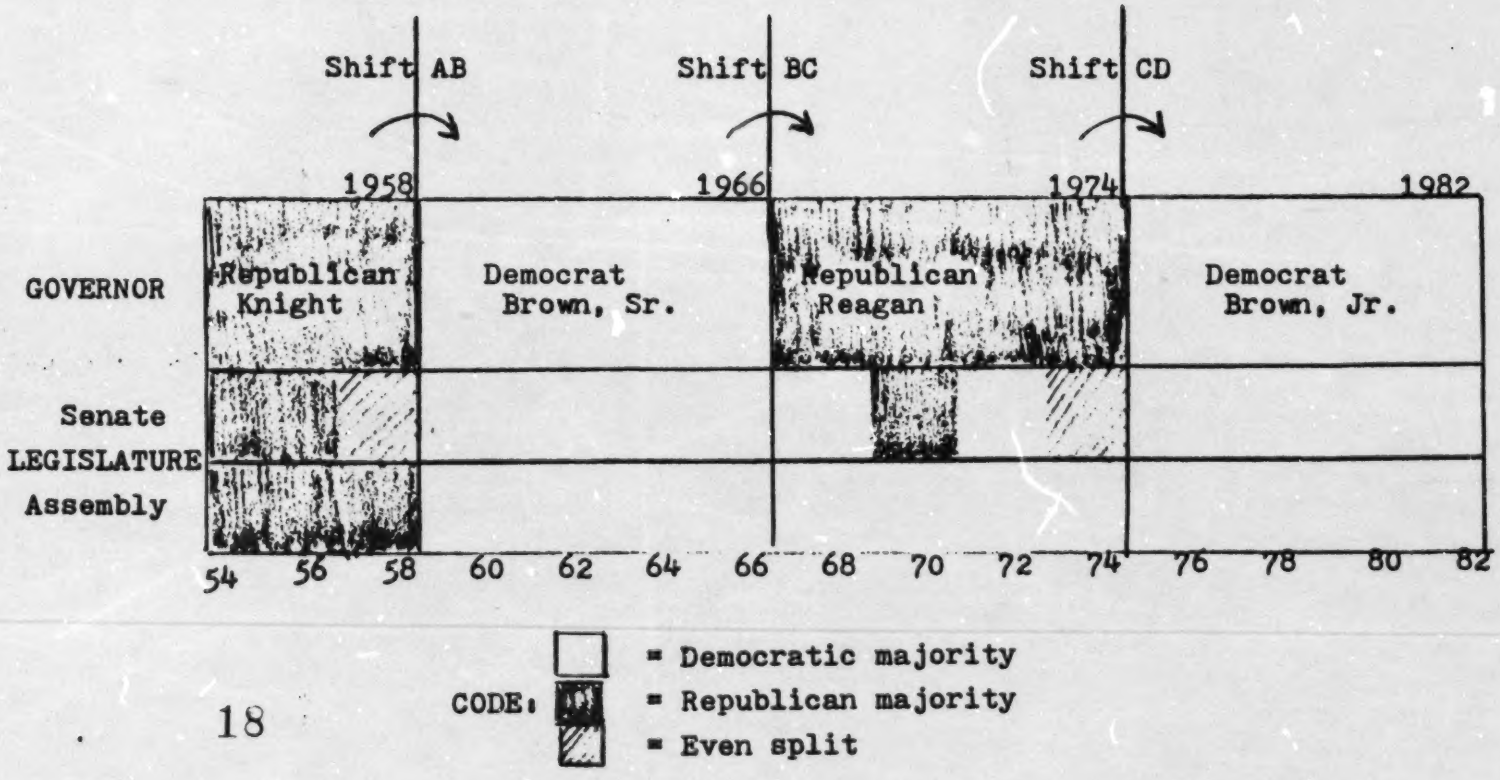
None of the results were significant and thus Hypothesis Two was supported. Other studies have shown that when a higher court is able to reverse decisions, lower court justices respond by tending to vote less along their own party lines. On the other hand, when a court is a court of last resort, the justices apparently feel less pressure to respond to political and social cues such as changes in political power. Because the California Supreme Court is effectively one which cannot be overruled when the justices, in important decisions, choose to rule on state constitutional grounds, the hypothesis suggested that the court would not be affected by the election of a governor belonging to a political party other than that of the preceding governor. Judging from the justices' votes, the court, in fact, did not attempt to accommodate any changes in political power. The California court has, thus far, survived organized attacks, including several recall attempts, to continue in its commitment to guarantee the individual rights, such as freedom of speech, due process, and equal protection, of students and professors in California. Three factors support this commitment: First, the court, when considered necessary in important decisions, especially regarding issues of possible national concern, will rule on independent state grounds, avoiding review by the United

States Supreme Court. Second, no California Supreme Court justice has ever been refused confirmation by the voters and no recall has thus far been successful.

There is a third reason why the California high court may, even in the face of changes in governor and presumably the attitude of California voters, feel comfortable in voting its own liberal views of education policy. Since 1954, California has had only five years of a Republican majority in the Senate. Those years were 1954-56 and 1969-70. An even split occurred in the Senate in 1957-58 and again in 1973-74 during Republican administrations. In addition, only during the years from 1954-58 was there a Republican majority in the California Assembly. A Democratic majority in the Assembly dominated the years from 1959-82 (see Table 5-1).

TABLE 5-1

POWER: The Governor and the Legislature



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California Supreme Court interpretations of statutes may be overturned by the California Legislature, but often the Legislature has, in fact, wanted the interpretation which was decided by the court. The Legislature may have lacked the necessary votes or may have faced, or assumed it would face, too much opposition from the electorate to pass laws which it allowed, by default, to be passed by the court (Fairbanks and Mann, California Journal, May 1984, p.180.) The court, then, has acted in effect as a second legislature, at least in the view of its critics, when the California Legislature itself has failed to exercise leadership in the area of constitutional rights in education decisions.

While evidence exists that the California Supreme Court does interpret statutes which Legislators may desire but cannot pass, there is also evidence that the court will face the Legislature in a constitutional crisis, if necessary, and strike down legislation which the court sees as a threat to individual rights.

Those critics who would limit the court's power by threatened recall or by subjecting the justices to contested elections would thus cause the justices to be subject to the political exigencies of the Legislature and the governor. Thus far, the people of California, in rejecting recall attempts and by confirming the liberal justices under attack, have allowed the California

Supreme Court to remain independent. This phenomenon may be founded in unawareness or naivete on the part of the electorate. But the unwillingness of Californians to abandon their belief in judicial independence is a formidable obstacle to the court's detractors. The concept of a judiciary apart from political influence strongly mitigates against justices being punished for unpopular opinions, even when the voters themselves turn more conservative or liberal and elect a governor of another party.

The effects of background variables on education decisions

Hypothesis Three proposed that judicial voting behavior would be significantly related to key background variables: 1) age at appointment, 2) number of years on the California Supreme Court, 3) justice's religious background, 4) justice's political party affiliation, 5) appointing governor's religious background, and 6) appointing governor's party affiliation.

The results showed that a justice's political party, the appointing governor's political party, and the governor's religion were important variables. There were significant differences in mean scores when the justices were grouped according to these variables, supporting, in part, Hypothesis Three. Contrary to the hypothesis, a justice's religion was, by

itself, not sufficient to cause mean scores to differ significantly. Nor were age at appointment or number of years on the court, again contrary to the hypothesis, significantly related to mean scores (see Table 6-1).

Studies of the federal courts of appeal and the United States Supreme Court have already shown that justices are influenced by their values and attitudes in deciding policy issues in the courtroom. California Supreme Court justices also deal with an issue by pursuing their own judicial policy objectives. And, importantly for this study, California Supreme Court judicial attitudes heavily depend on the political party membership of the appointing governor, the justice's own political party, and on the religion of the appointing governor.

TABLE 6-1
t-tests for independent groups

The effects of the appointing governor's political party
on justice's mean score in support of civil rights claims

Group	N	mean score	SD	t	p
Justices appointed by Democratic governors	17	.78	.19		
Justices appointed by Republican governors	7	.29	.25	5.14 *	< .001

The effects of the appointing governor's religion
on justice's mean score in support of civil rights claims

Group	N	mean score	SD	t	p
Justices appointed by Catholic governors	13	.80	.19		
Justices appointed by Protestant governors	6	.30	.28	4.70 *	< .001

The effects of justice's political party affiliation
on justice's mean scores in support of civil rights claims

Group	N	mean score	SD	t	p
Democratic justices	15	.81	.18		
Republican justices	9	.35	.25	5.16 *	<.001

The effects of justice's religion
on justice's mean scores in support of civil rights claims

Group	N	mean score	SD	t	p
Non-Protestant justices	12	.71	.26		
Protestant justices	8	.51	.38	1.45	.08

* significant

Support of the education agency

Hypothesis Four proposed that the propensity to support the education agency in all education decisions would not be related to the court majority party affiliation. In substantiation of this hypothesis, a court's propensity to support the education agency was, indeed, not affected by party affiliation. For this analysis, all education decisions, unanimous and non-unanimous, were used.

The notion that responsibility for educational decision-making should be vested in education agency authority, it could be argued, is part of conservative and, therefore, Republican doctrine. The rate of support for the education agency by the California Supreme Court, however, was not related to the political party affiliation of the court's majority. The difference between the means of the Republican majority court and the Democratic majority courts was not significant.

Thus, Democratic majority courts were no more liberal than was the Republican majority court. All supported the education agency about equally, and less than half the time.

Additionally, support for the agency was not related to any particular agency level. More than half of the cases concerned

the public schools, while about a third dealt with higher education. Although agency level was not an issue, the claimant was. Students and parents won the most decisions, 73 percent of their claims against the agency. Professors, teachers, and unions followed closely behind, winning 67 percent of their claims (see Tables 7-4, 7-5).

TABLE 7-4

THE EDUCATION AGENCIES

HOW THEY FARED WITH THE CALIFORNIA SUPREME COURT, 1954-1982

Frequencies and Statistics

	N of cases	Percent	N for agency	N against	Percent for agency
Higher Education	43*	33	19	23	45
K-12	69	53	28	41	41
State agency	11	8	5	6	45
Religious schools	2	2	2	0	100
Other	6	5	NA	NA	NA
TOTALS	131	100	54	70	44**

* Forty-two were applicable.

** 54 ÷ 124 applicable decisions = 44 percent.

TABLE 7-5

THE EDUCATION AGENCY: WHO SUED AND WHO WON

Frequencies and statistics

	N of cases	percent of total	Decisions for litigant opposing agency	percent	Decisions for agency	percent
Education Agency v.Teacher or union	54	41%	36	67%	18	33%
v.Student or parent	22	17%	16	73%	6	27%
v.Other agency	20	15%	4	20%	16	80%
v.Business or private party doing business	13	10%	8	62%	5	38%
v.Taxpayer	4	3%	2	50%	2	50%
v.Other	18*	14%	4	36%	7	64%
TOTALS	131	100%	70	56%	54	44%**

* Seven were not applicable, leaving eleven cases considered.
** Fifty-four ÷ 124 applicable decisions = 44 percent.

Education decision-making in the recent-era court

Hypothesis Five proposed that the California Supreme Court from 1954-70 would have a significantly lower percentage of cases decided on state constitutional grounds (4%) than would the court from 1970-82 (12%). All education decisions, 1954-82, both unanimous and non-unanimous, were analyzed. Contrary to the hypothesis, a Phi Contingency Coefficient found no significant relationship between the two courts and their propensity to vote on state constitutional grounds (see Table 8-1 below).

TABLE 8-1

CALIFORNIA SUPREME COURT EDUCATION CASES

DECIDED ON STATE CONSTITUTIONAL GROUNDS, OPPOSING FEDERAL STANDARDS

Phi Contingency Coefficient

	Total N of cases decided	N decided on state grounds	Percent	Phi	p
Court 1 (1954-70)	54	2	4	-.14	>.10
Court 2 (1970-82)	77	9	12		

When the United States Supreme Court, in 1970 under Warren Burger, began to more strictly construe the constitution, it became necessary for the California Supreme Court and other state high courts to rely on state grounds in order to avoid being overruled. The state supreme court reached educational policy decisions contrary to those of the federal court involving nearly identical issues.

Serrano v. Priest (1971) marked the first open acknowledgement of the court's intention to rule on independent grounds. In addition, Serrano created a new principle of law: Education was henceforth to be regarded as a fundamental interest and protected as equally as the long-standing protection in property rights. It was at this point that other states took up the banner, several of them ruling, in the mode of Serrano, that an education finance system could not be based upon unequal school district wealth. Because California and the other states which followed ruled on state constitutional grounds, their decisions could not be overruled on the basis of San Antonio Independent School District v. Rogriquez (1973), the United States Supreme Court decision which ruled that, in fact, education was not a fundamental interest and disparate financing systems did not violate equal protection under the United States Constitution.

In this way the California Supreme Court embarked on a decade of decisions which, despite the United States Constitution's

supremacy clause, the California high court has managed to maintain a considerable degree of independence from the "mother" court. At base is an interesting paradox. The liberally-disposed California court enjoys its latitude in large measure because the conservative bent of the current United States Supreme Court leads it to an interpretation of federalism which tends to cede as much leeway as possible to the states. Thus, the highest court in the land avoids insofar as possible reviewing decisions by state courts grounded in state law.

Conclusions and policy recommendations

Education policy-makers cannot count on federal judicial holdings to be definitive or binding. On the contrary, litigants in California seeking redress of grievances in education matters can more readily turn to the state constitution. Entitlement to education is a state matter, constitutionally guaranteed in California. State supreme courts throughout the nation which are seeking to provide equal access for students to universities and schools, and to protect the First Amendment rights of professors and teachers, can do so, using state constitutional law, and without having to rely on federal interpretations.

The argument remaining is not whether judicial law-making exists. It has been shown both in federal court studies and in this study of the California Supreme Court that judicial law-making and, thereby, judicial educational policy-making is alive, well, and by no means universally accepted. The California high court, supported by the attitudes and values of the justices, clearly engages in social change and reform. That these attitudes and values reflect those of the appointing governor is, if not virtually guaranteed, largely predisposed by that governor's choice of justices of the same political party, and often of the same religion.

Perhaps, one might speculate, if governors could be assured of a moderate judiciary, they might feel freer to choose justices of either party. Some commentators have argued that justices should pass muster with the state senate, i.e., that senate confirmation should be required. Such a process, however, could render selection even more political. A potential high court justice in California is already exposed to evaluation by two commissions. Some have charged that the Commission on Judicial Nominees Evaluation, an arm of the State Bar which makes judicial recommendations to the governor, is subject to political bias, hiding behind confidentiality to support favorites. According to its critics, the Commission on Judicial Appointments, which confirms gubernatorial appointees to fill appellate court vacancies, merely rubber stamps the governor's nominations.

In any event, when looking at the biographies of the California Supreme Court justices, it is not difficult to conclude that, in fact, governors often appoint justices who have been significant in the governor's power rise, or have been long-term members of the governor's social and poltical structure. More than one governor has appointed his former law partner, his gubernatorial campaign chairperson, or has co-authored a book with the justice. This pattern, of course, is hardly unknown throughout the history of the United States Supreme Court. But it is noteworthy, even so, that nine of the 26 justices in this study had, prior to their selection as judges, been visibly active in partisan politics. To opt for a moderate judiciary would necessitate eliminating post-election political plums, an action which might serve to sabotage the election itself. To assume, then, that a governor ordinarily encourages, or is even interested in, justices who decide on the basis of legal principles may be politically naive.

Californians are left with a California Supreme court that is essentially a third political arm, equal in potential, but not actual, power to that of the California Legislature. The Legislature has the money to carry out its law-making; the judiciary must depend upon the Legislature to support its decision-making with budget appropriations. In addition, the Legislature has the power to overrule judicial decisions, although in some instances that may require a cumbersome process

for amending the constitution.

Given that judge-made law, and thus judicial activism, is extant in the California Supreme Court, the questions remaining are twofold: does it benefit society in general and education in particular, and does it work? Both parts of the argument are impacted by the fact that the court is not required to answer directly to the public. The first half of the answer is: when it works, it benefits education.

Since 1954, when state mandated segregation was discredited by the United States Supreme Court, the California Supreme Court has increasingly defended the rights of individual teachers, professors, and students. Legislation which infringes upon the rights of these individuals has been dealt with harshly by the California court. The lesson of constitutional due process and equal protection clauses is that individual personal rights must be protected against the will of the majority. When laws or education agency policies discriminate against minority rights, then, regardless of majoritarian will, the court must act. Sometimes only the California Supreme Court, relatively insulated as it is from the electorate, is in a secure enough position to act.

By way of illustration, one could contemplate the dilemma brought about by the current emphasis on quality in education.

California now requires, as many other states do, a basic skills test for teachers. But only 26 percent of Blacks and 39 percent of Latinos who have taken the test have passed it (Savage, Los Angeles Times, 16 July, 1984, Part I, p.1). The disparate effect on minorities means that the percentage of minority teachers may well drop to only five percent of California's public teaching force by 1990.

The United States Supreme Court upheld the use of the National Teachers Exam in 1978, but a federal district court in California found, in 1979, that standardized intelligence tests were violative of both Title VI of the 1964 Civil Rights Act and the equal protection clause (Larry P. v. Riles 1979). That court found that the impact of the tests was discriminatory. Further, commentators have charged that a serious barrier to the desegregation of colleges and universities is standardized achievement and aptitude tests, which have an effect, on the whole, of preventing minorities from being admitted (Farrell 1984, p.12).

Thus state court tests might argue that, given the unequal effects of basis skills tests, such tests could be viewed as suspect and invite stricter scrutiny on the part of the courts. Failure on the part of teacher education departments in universities and colleges to provide means by which minorities can be recruited and admitted to teacher training and pass the

basic skills tests, arguably has had a discriminatory impact and has led to unequal access. Sociologically, the final result, critics have charged, is that the public schools, increasingly minority populated, will have few minority teachers, leaving the children with few minority role models. If the universities are reluctant to act, then it is possible that the court may be called upon to cause the teaching profession to be more accessible to minorities.

Education policy-makers cannot rely on the guidelines of federal court rulings, but must act to defend equal protection. Not to do so is to eventually and, perhaps, inevitably, invite intervention from state supreme courts.

But when a court is required to intervene because of inaction by education decision-makers, a paradox emerges. Courts are not always legitimized by the people they serve. While protecting individual and minority rights, as judicial policy-making in education must, and, some would argue, is ordained to do, such policy-making has contributed to the feelings of loss of power by parents and education agencies.

Education agency policy must, for instance, be fueled by financial appropriations which are, in turn, approved by agencies which ultimately answer to the public. It becomes apparent, in reading the opinions of the justices, that the courts, in

general, are mindful of the tension which exists and the balance which must be maintained between a commitment to local control and commitments to due process and equal protection rights. Even so, court decisions are not primarily concerned with the costs of the programs they require.

For example, in California, the Legislature was asked to make up the deficits incurred by the program costs which were mandated by court decisions requiring special education for handicapped students. School districts would have had to make cuts in other programs to make up the difference. (2) Without sufficient financial support, court-made education policy cannot fulfill its promise.

So the second half of the answer to the question of whether judicial decision-making in education benefits society and whether it works is also influenced by the courts' separateness from the electoral process: the affected majority constituency may not legitimize the courts' actions. As one commentator has stated, "The American working class . . . [and] the democratic tradition [hold] that authority in public life is legitimate only if it represents the will of the governed" (Gintis 1980, p.33).

(2) California schools in 1981 faced a $101.9 million shortage in state funds for handicapped students. Required by law, the California Master Plan for Special Education program cannot be cut. 1981 costs were $729.4 million, creating the deficit (The Enterprise 27 March, 1981).

The people, then, feeling impotent in influencing the direction of the education of their children, can, and will, withdraw both social and financial support.

This study has presented evidence for what was already intuitive. Judicial values and attitudes help to define education policy in California. Individual Democratic justices are concerned with conflicts of interest between the wealthy and the poor, racial minority rights as opposed to majority concerns for the status quo, and the constitutional rights of those who, although possibly perceived by others as repugnant, nevertheless are entitled to the same due process, equal protection, and freedom of speech as are the majority. On the other hand, individual Republican justices are concerned with deciding on a foundation of legal issues and prior decisions. These conservatives tend to follow institutional authority, discounting the contention of some critics that it may be rigid and intolerant, and they endeavor to conserve eduational resources and preserve local control, or the will of the governed when a conservative majority exists. Values and attitudes, surfacing as judicial background variables such as party, are prerequisite to making such decisions.

Thus judicial attitudes range from narrow to broad interpretations of the Federal Constitution, from strict to liberal constructions of the California Constitution, from

judicial restraint to judicial activism. Objectives are reached by whatever strategies are feasible, including, in crucial decisions, bargaining and compromise. Conservative justices consider legal issues and stare decisis essential. Innovators, those who would broaden constitutional rights, are law-makers, who will interpret prior decisions to make the law correspond to contemporary social and economic necessities. Political party affiliation is on some occasions sufficient condition for California Supreme Court judicial decision-making. And, it is on other occasions, at minimum, a necessary condition for the same.

It may very well strike the unaware observer that such a mode of decision-making is unexpected, but this study has shown that de facto California Supreme Court behavior, at least with regard to the decisions with which this study is interested, is in fact, at least political and at worst a validation of the appointing governor and the prevailing socio-political climate at the time of the appointment.

There may, and should be, serious moral concerns about these findings. And such concerns should not be a function of our naivete, but of an ideal that the courts, and especially the California Supreme Court, indeed should stand above partisan politics.

Yet, as a politically pragmatic deduction, it is apparent both

from this study and others that have preceeded it that there is no ideal that shall persuade any intellectually literate person that perfection can exist.